IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1161

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
REGULAR COMMON CARRIER CONFERENCE,
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE AND
ASSOCIATION OF AMERICAN RAILROADS,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONERS

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D. C. 20006

BRYCE REA, JR.
JOHN R. BAGILEO
DAVID H. COBURN
918 - 16th Street, N. W.
Washington, D. C. 20006

Counsel for National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference and Common Carrier Conference—Irregular Route

HARRY J. BREITHAUPT, JR.
HOLLIS G. DUENSING
1920 L Street, N.W.
Washington, D.C. 20036

HARRY J. BREITHAUPT, JR.
HOLLIS G. DUENSING
1920 L Street, N. W.
Washington, D. C. 20036

Counsel for Association of American Railroads

April 28, 1977

15936-4-77

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1161

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
REGULAR COMMON CARRIER CONFERENCE,
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE AND
ASSOCIATION OF AMERICAN RAILROADS,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONERS

INTRODUCTION

This reply brief is filed in response to the joint brief of respondents United States of America and Interstate Commerce Commission (Government's brief) and to the brief of respondent Sunkist Growers, Inc. Herein, petitioners will rebut the primary contentions upon which respondents ground their opposition to the above-referenced petition for a writ of certiorari (petition).

REPLY ARGUMENT

Respondents argue that shipments of citrus fruit made on an f.o.b. packinghouse (origin) basis by an agricultural cooperative on behalf of Sunkist qualify as "member transportation" within the intendment of

Section 203(b)(5) of the Interstate Commerce Act (Act), 49 U.S.C. § 303(b)(5), because the shipments benefit the farmer members of Sunkist by "furthering the legitimate commercial interest of the association's farmer members in marketing their products." (Gov. brief, p. 4; Sunkist brief, p. 3).

The argument is without merit. To state that the movement of farm goods to market on an f.o.b. packinghouse (origin) basis benefits farmers who do not pay for the transportation, do not hold title to the goods transported and do not bear the risks of the transportation is to engage in fantasy. It is the nonmember wholesalers, jobbers and chain stores who bear these normal transportation burdens and it is they who receive the primary benefits of the transportation. See *Southern Pac. Co.* v. *Darnell-Taenzer Lbr. Co.,* 245 U.S. 531 (1918); *Alabama Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.,* 204 I.C.C. 195 (1934). The term of sale here thus has the following effect: It mandates a finding that the "nature of the relationship" between Sunkist and the nonmembers is simply one of agency and that the disputed transportation is performed on behalf of the nonmembers. Compare *United States* v. *Pacific Coast Wholesalers Assn.,* 338 U.S. 689 (1950).

Even assuming, *arguendo,* that farmer members of Sunkist may incidentally derive some advantage from the ready availability of cooperative transportation to move products in which they no longer retain title, it is manifest that Congress did not intend to foster activities only incidentally beneficial to farmers. In *Case-Swayne Co.* v. *Sunkist Growers,* 389 U.S. 384, 393 (1967), this Court recognized that the Capper-Volstead Act, pursuant to which cooperatives are exempt from federal antitrust laws, is a "special [exception] to a general legislative plan" and, as such,

must be narrowly construed so that its benefit flows only to agricultural *producers* and not primarily to agricultural *middlemen.* As shown in the petition (pp. 9-12), Section 203(b)(5) of the Interstate Commerce Act is similarly a "special exception" statute designed to benefit agricultural producers and, as such, it merits the same narrow construction. See *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U.S. 299, 311 (1931).

Moreover, contrary to respondents' suggestion, a ruling favorable to petitioners will not limit the availability to farmers of transportation, but rather will restore to Section 203(b)(5) of the Act the balance sought by Congress between efficient movement of farm traffic and the prevention of unauthorized diversion of traffic from the regulated rail and motor carrier industry. The Government, therefore, proves nothing by its claim that the "prompt, dependable movement of these perishable products to consumers" accords with the mandate of that statute. (Gov. brief, p. 5, fn. 2). That "benefit" to farmers is not dependent upon the categorization of their traffic as "member transportation." The same "benefit" would be derived if the traffic was classified as "nonmember transportation", yet the unwarranted injury to petitioners would then be avoided.

Finally, despite respondents' arguments, the threat to petitioners of diversion of traffic is real. (Gov. brief, p. 5; Sunkist brief, p. 3). The reasons for the diversion of traffic from petitioners resulting from the categorization of this "nonmember transportation" as "member transportation" were described in the initial petition. (Pet. p. 13). Nothing in Section 203(b)(6) of this Act, 49 U.S.C. § 303(b)(6), assuages this threat. (Gov. brief, p. 5). That the movement of the commodi-

ties Sunkist transports are otherwise exempt from regulation under Section 203(b)(6) does not affect their status as "nonmember business" under Section 203(b)(5) and thereby does not reduce the adverse impact of this decision on the regulated transportation industry. See *Machinery Haulers Assn.* v. *Agricultural Commodity Serv.*, 86 M.C.C. 5, 21-22 (1961).

CONCLUSION

Petitioners submit that the respondents have failed to establish that there are not "special and important" reasons for granting the petition for a writ of certiorari.

Wherefore, petitioners renew their prayer to this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D. C. 20006

BRYCE REA, JR.
JOHN R. BAGILEO
DAVID H. COBURN
918 - 16th Street, N. W.
Washington, D. C. 20006

Counsel for National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference and Common Carrier Conference—Irregular Route

HARRY J. BREITHAUPT, JR.
HOLLIS G. DUENSING
1920 L Street, N.W.
Washington, D.C. 20036

HARRY J. BREITHAUPT, JR.
HOLLIS G. DUENSING
1920 L Street, N. W.
Washington, D. C. 20036

Counsel for Association of American Railroads

April 28, 1977